Supreme Court, U.S.
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No. _____

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1997

Jadair Incorporated, *Petitioner-Defendant*,

v.

Allied Colloids Inc., *Respondent-Plaintiff*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the District court's refusal to give more than three months temporary legal effect to Jadair's *pro se* Answer and/or the Answer signed by its regular Wisconsin trial attorney, merely because of its local rules, and the resultant imposing of a "default" judgment after a lapse of less than four months from the commencement of the civil action, constituted prejudicial error because:

A. inconsistent with provisions in the Federal Rules of Civil Procedure and/or statutory provisions in 28 U.S.C.?

B. incompatible with Federal common law principles?

C. in violation of Jadair's and/or its Wisconsin trial attorney's rights under the United States Constitution's:

   i. Due Process guarantee?

   ii. equal protection of the laws guarantee?

   iii. Privileges and Immunities guarantee?

Whether the District Court's local rule 6(A), which restricts the attorneys who are "eligible" to practice before that District Court to those who are members in "good standing" of the Bar of the Supreme Court of Virginia, is

invalid, at least as applied to Jadair's second Answer, because:

A. inconsistent with provisions in the Federal Rules of Civil Procedure?

B. inconsistent with statutory provisions in 28 U.S.C.?

C. incompatible with Federal common law principles?

D. in violation of provisions in the Sherman Act?

E. in violation of Jadair's and/or its Wisconsin attorney's rights under the United States Constitution's

i. Due Process guarantee?

ii. equal protection of the laws guarantee?

iii. Privileges and Immunities guarantee?

Whether Local Rule 6(D)(F) which requires parties utilizing trial attorneys who are *not* members in "good standing" of the State of Virginia Bar to "associate" with a local attorney who is and also requires the *associated* "local counsel" to be fully prepared to try the case at trial, is invalid because:

A. inconsistent with Federal Rules of Civil Procedure provisions?

B. inconsistent with statutory provisions in 28 U.S.C.?

C. incompatible with Federal

common law principles?

D. in violation of Sherman Act provisions?

E. in violation of Jadair's and/or its Wisconsin attorney's rights under the United States Constitution's

   i. Due Process guarantee?

   ii. equal protection of the laws guarantee?

   iii. Privileges and Immunities guarantee?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

Jadair Incorporated, *Petitioner-Defendant*,

v.

Allied Colloids Inc., *Respondent-Plaintiff*.

PETITION FOR WRIT OF CERTIORARI

Petitioner Jadair Incorporated ("Jadair"), by its attorney, respectfully petitions this Court to issue a writ of certiorari to review the unpublished Decision of the United States Court of Appeals for the Fourth Circuit Court ("Fourth Circuit"). (See App., tab A)

OPINIONS BELOW

The unpublished Decision of the United States District Court for the Eastern District of Virginia ("District Court") imposed a "default" judgment against Jadair on July 8, 1996 merely because neither of its two Answers, which

had been filed "subject to defect", had yet (i.e. during the four months since the commencement of the civil action) been signed by a member of the State of Virginia's Bar. (App., tab D) The Fourth Circuit affirmed upon the grounds that there had been no violations of Jadair's constitutional rights and that imposition of the "default" judgment was not an abuse of the District Court's discretion. All of the other issues posed in this Petition, which also had been argued to the Fourth Circuit, were *not* expressly resolved.

JURISDICTION

Jurisdiction over this appeal in this civil action is provided by 28 U.S.C. § 1254 and Rule 10(b)(c), Rules of the Supreme Court of the United States ("R.S.C.U.S."). The Decision of the Fourth Circuit was filed on March 16, 1998 and this Petition will be filed within the requisite 90 days thereafter.

UNITED STATES CONSTITUTIONAL PROVISIONS INVOLVED

Article IV, sec. 2, provides:

> "The Citizens of each State shall be entitled to all Privileges and Immunities of

Citizens in the several States."

Article V of the Amendments provides:

"No person shall be...deprived of life, liberty, or property, without due process of law..."

STATEMENT

A. Proceedings at the District (Trial) Court Level

This civil action was commenced by plaintiff Allied Colloids Inc. ("Allied") on March 13, 1996, alleging that $61,082.51 was then due and owing, as a result of materials sold to Jadair on an open account. Jadair's first Answer, *pro se*, was dated March 29, 1996, and was filed "subject to defect" by the District Court's Clerk ("the Clerk"). The District Court ruled in its April 4, 1996 Order that "(t)he defect is a corporation may *not* respond except through *duly authorized* counsel." The Answer alleged that the total debt was only $52,614.46 and that all of that amount was *not* then due and owing, and also alleged two affirmative defenses (equitable estoppel bar and *no personal* jurisdiction). (See Fourth Circuit Joint Appendix ("4th Cir.

J. App."), pp.1-9)

On April 8, 1996 Jadair filed a substantially identical second Answer, which was signed by its *regular* Wisconsin trial counsel, Ross R. Kinney, who also applied to be admitted to practice before the District Court. The District Court on May 17, 1996 ruled that attorney Kinney was *not* even *eligible*, simply because he was *not* a member of the State of Virginia's Bar. That second Answer was also filed "subject to defect". (See App., tab B; 4th Cir. J. App. pp.10-18)

On May 20, 1996 the District Court found factually, *inter alia*, that "...Jadair so far, has exercised *good faith* in its attempts to file a proper response to Allied's complaint." (See App., tab C, p.8) Nonetheless on July 8, 1996, less than four months after the civil action was commenced, a "default" judgment was imposed because no "local counsel" had yet been willing to sign either of the two Jadair Answers which had been filed "subject to defect". But no evidentiary hearing was held and there was no factual finding that Jadair had acted in "bad faith" or could have *reasonably* persuaded any attorney who was a member of the State of Virginia Bar to act as its "local counsel", despite its severe lack of cash available at that time to pay for such services. (See App., tab D)

B. Appellate Proceedings

On July 24, 1996 Jadair appealed to the Fourth Circuit. A Virginia attorney, D. Wayne Hines, came forward during early August, 1996--only about one month after imposition of that "default" judgment--and agreed to be "local counsel".[1] His name appeared on Jadair's December 4, 1996 initial brief. The Fourth Circuit affirmed *per curiam*. But its opinion did *not* even come to grips with the lack of available money aspects of any of the issues posed nor did it resolve any of the issues spawned by the impact of the

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[1]The District Court chose *not* to reflect them in its docket sheet and apparently did *not* include them in the "record" forwarded to the Fourth Circuit. But Jadair's brief pointed out to the Fourth Circuit that attorney Kinney on July 11, 1996 had mailed to the District Court "for filing" copies of nine letters he had received from Virginia lawyers declining to "associate" as "local counsel". He had previously mailed 40+ letters to lawyers practicing in the Norfolk, Virginia area. There never were any *affirmative* direct responses! But *indirectly* attorney D. Wayne Hines of Virginia Beach said he heard about these letters from a friend.

District Court's local rules and practices that collectively required "local counsel" to be fully ready to try the entire case at the trial.

REASONS FOR GRANTING THE PETITION

Introduction

This Petition affords this Court a *rare* opportunity to clarify a number of important and *uniquely* posed legal issues involving interpretations and applications of the Federal Rules of Civil Procedure and 28 U.S.C. statutory provisions, as well as potential interpretations and applications of United States constitutional provisions and/or potential fashioning of Federal common law principles. These issues arise out of local rules *and practices* of the District Court which collectively required (1) all defendants in civil actions commenced in that District, in order to file a legally valid Answer sufficient to avoid a "default" judgment, to have retained "local counsel", (2) who would have to be ready, able, and willing to try the *entire* case on his or her own when it comes to trial, (3) just because--and even though--the principal attorney representing that defendant is *not* a member of that District Court's Bar (i.e. *not* a member of the State of

Virginia Bar).

Extensive legal research discloses *no* published opinion of any court in this country dealing with such specific legal issues involving so-called "local counsel" who must be the *alter ego* of the client's principal trial attorney for trial purposes. As a result of this requirement, the client must pay for the services of *two* trial attorneys in order to defend a civil action commenced in that district court. At best this is an unjustifiable waste of money; at worst it bars severely *financially* strapped corporate defendants, such as Jadair, from being able to file a valid Answer sufficient to avoid a "default" judgment.

According to the record before the District Court, (1) Jadair's Wisconsin counsel had been making "good faith" efforts to retain such a "local counsel" and (2) nonetheless, none of the 40+ law firms contacted had been willing to so serve, apparently as a result of Jadair's lack of available cash to pay them for their expansive "local counsel" functions and duties. The District Court did *not* make any factual finding that the three month delay in obtaining "local counsel" to sign an Answer had delayed the normal processing of that four month old civil action. Ironically, one more month delay would have been sufficient, as attorney Hines came forward in early August, 1996.

Rule 10, R.S.C.U.S., in explaining the "character" of the "compelling reasons" that this Court considers in exercising its discretion, points out:

> **(a)** a United States court of appeals...has so far departed from the *accepted* and *usual course* of judicial proceedings, or *sanctioned* such a *departure* by a lower court, as to call for an exercise of this Court's supervisory power;
>
> ***
>
> **(c)** ...a United States court of appeals has decided an important question of federal law that has *not been*, but should be, *settled* by this Court, or has decided an *important* federal question in a way that *conflicts* with relevant decisions of this Court. (emphasis added)

These factors indicate that this Court should issue the requested Writ! It is only rarely that a financially disadvantaged small corporation is able to get such important issues before this Court for resolution. By definition, there is always an *inherent lack of available money* to pay an attorney! This

is a classic example of what can, and doubtlessly does, occur in *unpublished* opinions, and it poses several important legal issues, with razor sharp clarity, that plague small corporations in this country when they become embroiled in civil litigation.

A review of the District Court's decisions, as well as the Fourth Circuit opinion, establishes that there are *no* published judicial decisions in this country directly in point as to any of these precise legal issues. Accordingly, this Court should resolve them. The Fourth Circuit only cited five judicial decisions in its opinion. Moreover, in points of fact and law, *none* of them are directly in point. There is a lack of consistency between (1) the District Court and Fourth Circuit decisions in this case, and (2) some analagous state court and lower Federal court decisions, as well as some analagous decisions of this Court.

Rowland v. California Men's Colony, 506 U.S. 194, 202, 113 S.Ct. 716, 121 L.Ed.2d 656 (1993), a 5-4 decision, was cited with respect to the issue concerning the legal effect of Jadair's *pro se* Answer *vis a vis* provisions in F.R.C.P. and 28 U.S.C., and in support of the generalization that "...a corporation may not *appear pro se* but must be represented only by duly licensed

counsel." (App., tab A, p.4) But the majority's statement to that effect was in the context of a completely different issue concerning the interpretation of an *in forma pauperis* Federal statute containing the word "person". There was no "default" judgment issue involved!

Martin v. Walton, 368 U.S. 25, 29, 82 S.Ct. 1, 72 L.Ed.2d 5 (1961) was cited by the Fourth Circuit with respect to issues involving the Due Process, Equal Protection, and Privileges and Immunities guarantees. However, its holding and reasoning only dealt with an attorney attempting to become a member of the state of Kansas Bar. Asbury Hosp. v. Cass County, 326 U.S. 207, 66 S.Ct.61, 90 L.Ed. 6 (1945) also was cited with respect to those issues and, in particular, for the proposition that corporations are *not* protected by the Privileges and Immunities provisions. But that decision only related to those issues in the context of a state's rights to restrict foreign corporations ownership of land in the state and did not, *inter alia*, touch upon the issue whether Jadair has *standing* to complain about the deprivation of the constitutional Privileges and Immunities of its regular Wisconsin trial attorney.

Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corp., 843 F.2d 808 (4th Cir. 1988) dealt with a "default"

"default" judgment issue, but it resulted from an omission by a party's attorney--*not* a mere three month delay in persuading an attorney to sign as "local counsel" an Answer already filed. Moreover, even that default judgment was *set aside on appeal*.

Finally, Goldfarb v. Supreme Court of Virginia, 766 F.2d 859, 860-5 (4th Cir. 1985) was cited for the proposition that a "similar rule was rational and did not violate due process". However, that local rule, and hence the issue posed, were in points of law and fact, *markedly* different! It dealt with an attempt by an attorney to become a member of the State of Virginia's Bar in the context of his constitutional Due Process and Commerce rights, as interpreted and applied to a state rule barring attorneys from becoming members of that state's bar *unless* they practice *full-time* within that state. Interestingly that requirement meant that Jadair's regular Wisconsin trial attorney had *no chance* of ever becoming a member of the State of Virginia's Bar and, as a result of the the District Court's local rule, of its Bar.

I. Neither Rule 11 nor Rule 12, F.R.C.P., Expressly Bars all Corporations' Officers-Directors-Shareholders from

ever Signing any *Pro Se* Answers or Legally Invalidates all such Answers and/or Authorizes a "Default" Judgment as the Remedy-Punishment for a Violation Thereof

Rule 1, F.R.C.P., provides:

> They ["the rules"] shall be construed to secure *just*, *speedy*, and *inexpensive* determination of *every* action.
> (emphasis added)

Query whether the District Court's *per se* rulings enforcing its own local rules and practices via imposition of a "default" judgment, are incompatible with all three of the basic goals espoused in this Rule?

Rule 8(b), F.R.C.P., refers to *parties* and states that "(a) *party* shall *state* the party's defenses..."--*not* that an attorney must do so--let alone an attorney who is a member in good standing of the Bar of the state in which the district court is located! See also subsection (c) concerning "affirmative defenses" ("...a party shall set forth...") and Rule 9(a) ("...a party..."). Indeed Rule 11, F.R.C.P., expressly provides:

> A *party* who is *not* represented

> by an attorney shall sign the *party's* pleading, motion, or other paper and state the *party's* address. ... The signature of an attorney *or party* constitutes a certificate by the signer that...
>
> (emphasis added)

See also e.g. Rule 12(a), F.R.C.P. ("A defendant shall..."); Rule 16(a) ("...and any unrepresented parties..."); Rule 26(a) ("Parties may obtain discovery..."), Rule 30(a) ("...any party..."), and Rule 38(b) ("(a)ny party may...").

The District Court's July 8, 1996 "default" judgment order relied upon Rule 55(a), F.R.C.P.:

> When a *party* against whom a judgment for affirmative relief is sought *has failed to plead* or otherwise defend as *provided by these rules* and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.
>
> (emphasis added)

But conspicuous by their absence are any provisions that defendants' Answers also must be in accordance with the district court's local rules and/or practices!

Query whether the italicized words are incompatible with the District Court's rulings in this civil action? The "party" (Jadair) had *filed* (albeit ruled "subject to defect" because of the local rules) and served, two Answers in the manner "...as provided by *these rules...*". The District Court's local rules and practices simply imposed additional requirements.

Rule 77(a), F.R.C.P., provides:

> The district courts shall be deemed *always open* for the purpose of filing *any pleading* or other proper paper, of issuing and returning mesne and final process, and of making and directing *all* interlocutory motions, orders, and rules.
>
> (emphasis added)

Again conspicuous by its absence is any language giving local District Courts the right to simply disregard the ordinary legal effects of a "pleading" so filed by filing them "subject" to an adjudication of being "defective" merely because of non-compliance with a local rule and/or practice, and to thereafter order entry of a "default" judgment when that *local* "defect" is not cured within a mere three months.

However, Rule 83, F.R.C.P., goes on

to provide that all local rules and "practice[s]" must *not* be "...*inconsistent with these rules*". Query whether these local rules and/or practices *are* "inconsistent with these rules" by dealing with the *temporary* legal effect of Jadair's two Answers, which *are* governed by the aforementioned Federal Rules of Civil Procedure, in a manner *not* provided for therein (i.e. impose a "default" judgment after three months because no "local counsel" signed them)? Query whether those local rules and/or practices are *invalid*? Commentators have questioned the "validity of some [local] rules." See e.g. 1993 Federal Civil Judicial Procedure and Rules (West Publishing) p. 216. But the Fourth Circuit did *not* expressly resolve any of these issues!

II. Nor do 28 U.S.C. §§ 127, 1332 Expressly Require that all Corporations' Answers must be Signed by an Attorney or Legally Invalidate an Answer, and/or Authorize a "Default Judgment" as the Punishment of the Defendant for Violations (i.e. if it is Not so Signed)

28 U.S.C. (e.g. §§ 127, 132-44, 751-6, 1330-1412) also nowise supports the District Court's *per se* rulings and

"default" judgment. Those provisions deal with, *inter alia*, all district courts, including those geographically located in the State of Virginia, and all "parties'" Answers. 28 U.S.C. §127 established the Eastern District of Virginia and §1332 granted all district courts diversity jurisdiction. But nowhere did Congress deem it righteous, or sufficiently important, to specify therein who must sign parties' Answers in order for them to be legally valid. Instead, this was left to the Federal Rules of Civil Procedure, which have been previously analyzed.

However, 28 U.S.C. § 2071 does provide that all local rules "...shall be *consistent* with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title" and that "**(f)** No rule may be prescribed by a district court other than under this section." Query whether the aforesaid local rules and practices can pass muster under this section?

III. Federal Common Law Principles Should *not* Legally Invalidate Jadair's Answers Filed by the District Court "Subject to Defect" Merely because they had not yet (e.g. after only Three Months) been Signed as "Local Counsel" by an Attorney who was

a Member in "Good Standing" of the Bar of the State of Virginia and/or Authorize Imposition of a "Default" Judgment a Mere Four Months after the Civil Action was Commenced

This Court should embrace a "public policy" which serves and meets society's *present* needs, and fashion righteous Federal common law principles to govern these important and recurring litigation issues. This is unquestionably within this Court's authority--even under the Erie doctrine. This Court may, *inter alia*, modify existing principles so as to better reflect, and satisfy, the current needs and values of our country's citizens, including its corporate citizens. *Cf.* e.g., Currie, Wisconsin Supreme Court and the Common Law Tradition, 1971 Wis. L. Rev. No. 3, p. 818 ("Inherent in the common law is a dynamic principle which allows it to grow and to tailor itself to meet *changing needs* within the doctrine of stare decisis...").

These Federal common law principles should not only ensure that our country's financially strapped small corporations have meaningful "access" to our Federal courts, but also will be in a position to have their civil actions decided on their

substantive merits--*not* in response to legal technicalities serving no worthwhile legitimate purpose. There has been for years an ever increasing "crisis" among our middle class citizens--both human and corporate--as they simply *cannot afford* to pay for needed lawyering and, accordingly, their litigation needs have *not* been met! See e.g. John Skilton (President of the Wisconsin State Bar), September, 1995 Wisconsin Lawyer, page 5; John Skilton, August, 1995 Wisconsin Lawyer, page 5; Thomas S. Sliek (President of the Wisconsin State Bar), Wisconsin Lawyer, February 1993, p. 4.

Historically, this Court in granting Writs of Certiorari has, at times, resolved *important* legal issues relating to our country's bottom strata of "indigent" citizens, particularly in criminal cases. But legal research indicates that it has never addressed the important civil litigation issues being faced by the hard working *middle class* of citizens (e.g. corporate), which has been, and still is, the backbone of our country. This country's proud Federal common law tradition should *not* be undermined by legal technicalities that thwart their quest for justice and righteous results in our Federal court system--*even if they cannot afford to pay for even one good trial attorney.*

Federal common law should *not*

require a "party" in a civil action, even if it is a business entity rather than a human being, to do that which it or he or she is financially incapable of doing--or else be saddled with a "default" judgment. *Cf. e.g.* Feiges v. Racine Dry Goods, 231 Wis. 270, 285 N.W. 799 (1939); Llewellyn, The Common Law Tradition, (1960), pp. 23-4, **Responsibility for Justice**; Wisconsin Lawyer, Vol. 68, No. 6, June, 1995, pp. 27-8. The District Court's *per se* rulings, based upon its local rules and practices requiring corporate defendants to pay for a second unwanted and unneeded "local" trial counsel, only exacerbates the middle class's severe financial problems and has no legitimate place in our Federal common law.

The Fourth Circuit and District Court rulings in this case are hopelessly out of step with In Re Matter of Holiday's Tax Services, Inc., 407 F. Supp. 182, 183-4 (E.D.N.Y. 1976) (reversed bankruptcy judge's holding that a corporation could *not* ever appear in that district court except by an attorney; "...lower and middle income persons in civil cases..." at times simply cannot afford to pay an attorney). This righteous decision deserves to be the cornerstone of the controlling Federal common law principles!

Consider also e.g. Fraas Survival

System, Inc. v. Absentee Shawnee Ec. Dev. Auth., 817 F. Supp. 7 (S.D.N.Y. 1993) (refused to dismiss appeal); Hawkeye Bank & Trust v. Baugh, 463 N.W.2d 22 (Iowa 1990) (while adhering to the "general rule," nonetheless held that the trial court had *abused* its broad discretion "... when it denied Baugh a *brief continuance* to secure counsel for the corporation"); New England Capital Corp. v. Finlay Co., 624 A.2d 1358 (N.H. 1953); and A. Victor & Co. v. Sleininger, 255 App. Div. 673, 679, 9 N.Y.S.2d 323, 326 (1939).

Federal common law principles should yield just-righteous litigation results reflecting sound modern social policies in this era of computers, internet and airplanes. There is no legitimate place for historical, but now *unnecessary*, lawyer "feather-bedding" imposed by local rules and/or practices. "Parties" should not be coerced, as the *de facto* price of having the merits of civil actions in the Federal courts being resolved, into selling their houses and/or their family-owned corporations to pay for a second *associated* "local" trial attorney.

IV. The Requirements of Local Rule 6(A)(B)(C) which in Effect Limit those "Eligible" to Represent a Party in a Case Pending Before it to those

Attorneys who are Members in "Good Standing" of the State Bar of the Supreme Court of Virginia, are Invalid and Unenforceable, at least as Applied to Jadair and its Regular Wisconsin Trial Counsel

Some of the grounds for invalidity have already been explained in all three of the prior sections of this brief. Query what legitimate and reasonable litigation difference(s) it can make in the District Court in the mid 1990's--at least as to a party's Answer in deciding whether to impose a "default" judgment within the first four months of a simple civil action--whether attorney Kinney was *not* a member in good standing of the State of Virgina Bar?

Query also whether this local rule is invalid because in violation of the Sherman Act? It has for years served as a bulwark against not only anti-competitive "conspiracies," but also against all "other" cozy arrangements which *unreasonably* restrict competition in a given market. By limiting those attorneys who are "eligible" to practice before it, to only those who are already members in "good standing" of the State of Virginia Bar, the District Court--at least "facially"--*unreasonably* forecloses

competition in a very attractive-lucrative Federal legal market. All attorneys in this country who cannot become members of the State Bar of Virginia are *per se* barred and the State of Virginia Bar will *not* admit any attorney whose principal office is *not* solely in Virginia. *Cf. e.g.* Bates v. State Bar of Ariz., 433 U.S. 350, 97 S. Ct. 2691, 53 L.Ed.2d 810 (1977); Canton v. Detroit Edison, 428 U.S. 579, 96 S. Ct. 3110, 49 L.Ed.2d 1141 (1976); Goldfarb v. Virginia State Bar, 421 U.S. 773, 95 S. Ct. 2004, 49 L.Ed.2d 1141 (1973).

V The Requirements of Local Rule 6 (D)(F) Requiring Attorneys from States other than Virginia, to also Utilize Attorneys who are Members of the Virginia State Bar and the Local Practice of Requiring all "Local Counsel" to be Prepared to Try the Case at Trial, are Invalid and Unenforceable, at least as Applied to Jadair and its regular Wisconsin Trial Counsel under the Particular Circumstances in this Case

Under the Sherman Act, 15 U.S.C. § 1, "(e)very contract, combination in the form of trust *or otherwise*, or conspiracy

in restraint of...commerce among the several states...is hereby declared to be illegal." U.S. v. Realty Multi-List, Inc., 629 F.2d 1351, 1358-89 (5 Cir. Ga. 1980) focused upon an association of real estate brokers and its criteria for admitting new members. It held that these membership criterion were *not per se* "unreasonable" because "(w)e need to know more about the justifications for the particular restraints imposed and their competitive significance before we can judge their legality." But it then went on to hold as a matter of law that they "...on their *face* create..." unreasonable-unjustified restraints upon competition in that market.

Query, accordingly, whether the District Court's local rules and/or practices a[illegible] do so? (See App., tab E) Query whether the Fourth Circuit should have *at least* ordered an evidentiary Hearing to explore factually the justifications for and adverse impacts thereof, rather than simply ignoring this issue? It is difficult to conceive of a more effective restraint upon competition from non-members of the State of Virginia Bar! The District Court's local rules and practices are akin to those of a Virginia Lawyers *ONLY* union. They are like the historical union agreement provisions--which once were the universal *per se* rule--that each and every train

which desired to operate on this country's rails, had to have, for "safety" purposes, a caboose with at least one employee sitting therein at all times. This once justifiable rule, which became nothing but a "feather-bedding" perk in modern times and unnecessarily increased the costs of operating trains, has been for years now *thoroughly discredited* and eradicated.

VI. The Invalidating of Jadair's Two Answers and Imposing of a "Default" Judgment Merely because they had Not yet been Signed by an Attorney who was a Member of the State of Virginia's Bar, Violates the Constitution's Privileges and Immunities Guarantee, Due Process Guarantee and/or Equal Protection of the Laws Guarantee

The Iowa Supreme Court in Hawkeye (see post, p.20) pointed out that "(w)e recognize that due process requires the court system to be *accessible* to those who are aggrieved." This basic constitutional right was also recoginzed in Oahu Plumbing and Sheet Metal, Ltd. v. Kona, 60 Haw. 372, 590 P.2d 570 (1979). But query whether when a small financially strapped corporation is required

to "appear" via a second "local" trial counsel--though it cannot even afford to pay for its regular trial counsel--there is *no* meaningful "access" and the Federal courts are *not* really "open" to such a corporation when a "default" judgment is entered against it as the penalty for not yet having a local counsel? *Cf. also e.g.* Commonwealth of Pa. v. Local Union No. 542, Int'l. U. Of Op. Eng., 347 F. Supp. 268 (E.D.Pa. 1972); Ball v. Gee, 795 P.2d 82 (Mont. 1990) (requirement to deposit in a civil action $11,000+ in fees-taxes-costs violates Due Process and state constitutional guarantee of equal access to justice).

The Due Process and Equal Protection of the Laws guarantees should be applicable to, and impose limits upon, court systems' deprivations of parties' "property" interests. *Cf. e.g.*, Craig v. Carson, 449 F. Supp. 385, 389-91, 395 (M.D. Flo. 1978)(Due Process mandates, *inter alia*, that "...there must be *some legitimate* governmental or public reason asserted for depriving an individual of his liberty or *property*."). Due Process guarantees that court systems cannot infringe upon litigants' "property" interests via rules that are "arbitrary, capricious or without rational basis. *Cf. also e.g.*, Kaufman v. Board of Trustees, Community College, 552 F. Supp. 1143 (W.D. Ill. 1982) (held violated Due

Process and Equal Protection); Harrah Independent School District v. Martin, 440 U.S. 194, 99 S.Ct. 1062, 59 L.Ed.2d 248 (1979); Pyeatte v. Bd. of Regents of University of Oklahoma, 102 F. Supp. 407, 411-3 (W.D. Okla. 1951) *aff'd per cur.* 342 U.S. 936 (1952). But query whether there are any legitimate-justifiable reasons for the District Court's local rules and practices, and/or its "default" judgment against Jadair?

Due Process, as applied to courts' procedures, mandates a "balancing" of three factors (1) the particular kind of private liberty *or property* interest at stake, (2) the *risk* of a *wrongful* or *erroneous* deprivation of that interest, and (3) the public or governmental interest involved. *See e.g.* Craig, 449 F. Supp. at 391. But the Fourth Circuit's rulings did *not* engage in any "balancing" and did *not* articulate any "public or governmental interest" which supported its *per se* rulings! Yet the bottom line Due Process guarantee is that the procedural "safeguards" must be "meaningful and reasonable". *See e.g.*, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950); Craig, 449 F. Supp. at 391.

The essence of the equal protection of the laws guarantee is that similarly situated "persons" must be treated the same unless "meaningful, socially

relevant differences" justify the differences in treatment--i.e., equate with the "just distribution of benefits and burdens in society". The classifications cannot be arbitrary and must be based upon "distinguishing characteristics which are relevant to the states' legitimate interests. Cook v. Babbitt, 819 F. Supp. 1, 11 (D.D.C. 1993). The substantive Due Process guarantee is virtually co-extensive with the equal protection of the laws guarantee. *See e.g.*, Harrah, 440 U.S. at 194; Kaufman, 552 F. Supp. at 1153; Pyeatte, 102 F. Supp. at 415-6.

Covington v. Sandford, 164 U.S. 578, 17 S.Ct. 198, 41 L.Ed. 560 (1896) declared that "[i]t is *now settled* that *corporations* are *persons* within the meaning of the constitutional provisions forbidding the deprivation of *property* without due process of law, or well as a denial of the equal protection of the laws." A "corporation" is a "person" and as such, it is protected by the Due Process and Equal Protection of the Law guarantees. *See* also *e.g.*, Trapper Brown Constr. Co., Inc. v. Electromech, 358 F. Supp. 105, 106-7 (D.N.H. 1973); State v. Sowder, 826 S.W.2d 924 (Tenn. Cr. App. 1991) (...(A)ll forms of *property*..." are entitled to such protection).

Due Process guarantees *reasonable* access to courts. *See e.g.*, Hooks v.

Wainwright, 352 F. Supp. 163 (M.D. Fla. 1972), *aff'd* 529 F.2d 161 (10th Cir. 1976); Silver v. Cormior, 529 F.2d 161 (10th Cir. 1976); Boling v. National Zinc Co., 435 F. Supp. 18 (N.D. Okla. 1976). The impact of financial require-ments, which litigants can not afford to satisfy, was initially dealt with by this Court in the criminal litigation arena under the "liberty" guarantee. However, such requirements are also applicable in the civil litigation arena via the "property" guarantee. See e.g. Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956); Boddie v. State of Connecticut, 401 U.S. 371, 372, 375, 381-2, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971) (held litigation procedures requiring "payment of court fees and costs of service of process, that restrict access to the courts in an action for divorce" (i.e., in civil, *not* criminal cases) just because of their "inability" to afford to pay them (because of indigence), were also unconstitutional). *Cf. also e.g.* Piper v. Popp, 167 Wis.2d 633, 482 N.W.2d 353 (1992).

It has been recognized that "(t)he right to file an appeal is a property interest which may not be revoked absent due process of law." Kertes Ent., Inc. v. Orange Village, 593 N.E.2d 306, 307-8 (Ohio App. 1990) (emphasized "no preju-dice" to opposing party). See also e.g.

Atkinson v. Grummon Ohio Corp., 523 N.E.2d 851 (Ohio 1988). The right to appeal is also protected by the Equal Protection guarantee. (See e.g. Lindsey v. Normet, 405 U.S. 56, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972) (state's double bond requirement violated Equal Protec-tion guarantee because "arbitrary" and "irrational").

O'Day v. George Arakelian Farms, Inc., 536 F.2d 856,(9 Cir. 1976) held that the double bond requirement violated the Equal Protection guarantee because "...not reasonably or rationally related to a legitimate governmental purpose and [it] constitutes an effective bar to appeal" citing three decisions of this Court. It pointed out that "(a) cost requirement valid on its face may offend the Constitution as applied to a particular case." See also e.g. Merchants Ass'n. v. Conger, 606 P.2d 125 (Mont. 1979) (held statutory appellate requirement of filing a financial "undertaking" "double" the amount of the judgment, as a prerequisite to processing the appeal, was as *applied* to a natural person who could *not* afford to pay for it, a violation of Equal Protection); *Cf. e.g.* Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 0 L.Ed.2d 811 (1963); Lane v. Brown, 372 U.S. 477, 83 S.Ct. 768, 9 L.Ed.2d 892 (1963) (held governed by Griffin as violation of Equal Protection

because appeal right in effect denied to appellants that "could [not] afford "to pay for trial trans-cripts"); Rinaldi v. Yeager, Warden, 384 U.S. 305, 86 S.Ct. 1497, 16 L.Ed.2d 577 (1966) (held Equal Protection violated since it requires "some rationality in the nature of the class singled out... some relevance to the purpose for which the classification is made'" and the statutory provisions did *not* apply that requirement "with an even hand").

Respectfully submitted this 8th day of June, 1998.

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